LIBRARY
SUPREME COURT, U. S.

No. 1144

FILED
MAR 25 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1967

WILLIAM J. DONOHO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

MITCHELL ROGOVIN,
Assistant Attorney General,

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1144

WILLIAM J. DONOHO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

A jury in the Middle District of Tennessee convicted petitioner on all five counts of an indictment charging him with wilfully and knowingly subscribing to income tax returns which understated his adjusted gross income for the years 1957, 1958, 1960, 1961 and 1962, in violation of Section 7206(1) of the Internal Revenue Code, 26 U.S.C. 7206(1) (A. A. 2a-6a).[1]

[1] "A. A." refers to Appellant's Appendix in the court below. "G. A." refers to the government's appendix in that court.

Concurrent sentences of fifteen months' imprisonment together with cumulative fines of $500 were imposed on each count (A. A. 2a). The Court of Appeals for the Sixth Circuit affirmed (Pet. 23-27).

This result was correct. There is no question of general importance, conflict of decision, or any other matter justifying further review.

The government's theory was that petitioner, a police inspector in Nashville, Tennessee (G. A. 8b), had received bribes, but not reported them as gross income. (A. A. 6a-7a). In several bills of particulars the government stated that for 1960 and 1961 it would corroborate evidence of specific unreported graft payments by evidence of petitioner's net worth and expenditures (A. A. 6a-18a). A few days prior to trial, however, an amended bill was filed stating that the prosecution would rely solely on evidence of specific bribes (A. A. 18a-19a) for these as well as the other years.

Petitioner stipulated that none of the adjusted gross income he reported for the years in issue was derived from graft payments (A. A. 20a). Six prosecution witnesses testified that they had made regular monthly payments to petitioner during these five years, averaging in toto about $3,000 annually (G. A. 1b-21b). Petitioner testified that he had never received any such bribes (Pet. 5; cf. A. A. 29a, 33a, 34a).

There is no merit to petitioner's contention (Pet. 6-10) that the trial court erred in refusing to allow him to corroborate this denial by proof of his net worth and expenditures for the years 1960 and 1961. (A. A. 27a-28a, 30a, 31a-32a). Petitioner hoped to prove

(A. A. 28a, 31a-32a; Pet. 6) that he owed no taxes over and above those reported in his returns. The charges, however, were not wilful attempts to evade income taxes, but that petitioner had knowingly subscribed returns which understated his adjusted gross income in violation of Section 7206(1). In such prosecutions the question is whether the return contains a material misstatement of fact, and it is irrelevant whether the misstatement resulted in an underpayment of taxes. *Siravo* v. *United States*, 377 F. 2d 469, 472, n. 4 (C.A. 1); *Hull* v. *United States*, 324 F. 2d 817, 823 (C.A. 5); *Gaunt* v. *United States*, 184 F. 2d 284 (C.A. 1), certiorari denied, 340 U.S. 917; *United States* v. *Rayor*, 204 F. Supp. 486 (S.D. Cal.), appeal dismissed, 323 F. 2d 519 (C.A. 9), certiorari denied, 375 U.S. 993. Consequently, the only real issue before the jury was whether to believe the witnesses who testified that they had made graft payments to petitioner, or to accept his denials. A net-worth computation would have had at most a remote and tangential bearing on the question, and would have subjected the jury to a mass of irrelevant details. Compare *United States* v. *Costello*, 221 F. 2d 668, 674 (C.A. 2), affirmed, 350 U.S. 359; *United States* v. *Bowe*, 360 F. 2d 1, 15-16 (C.A. 2), certiorari denied, 385 U.S. 961; *Wilson* v. *United States*, 250 F. 2d 312, 325-326 (C.A. 9).

United States v. *Moody*, 339 F. 2d 161, decided by the same circuit which decided this case, does not conflict with the decision here. The charge in *Moody* was evasion of taxes, and the prosecution

proved the understatement of taxes by a bank-deposit computation. A net-worth computation offered by the defense to show that there had not been an understatement had an obvious and direct bearing, as either direct or rebuttal evidence.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

MARCH 1968.